LAND TRANSFER REFORM.

THE AUSTRALIAN SYSTEM.

SCARCELY had our ancestors first planted their infant settlements on the shores of Massachusetts Bay when they were brought face to face, with a problem still unsolved by us, how to provide a safe and practicable system of registration "for avoyding all fraudulent conveyances, & that every man may know what estate or interest other men may have in any houses, lands, or other hereditaments they are to deale in."[1]

On the first of April, 1634, less than four years after the arrival of Governor Winthrop with the Colony Charter, the General Court ordered that the constable and four or more of the chief inhabitants of every town should make "a surveyinge of the howses" and lands of every free inhabitant, and should "enter the same in a booke, (fairely written in words att lenght, & not in ffigures,) with the seũall bounds & quantities, by the neerest estimacon" and should "deliuer a transcript thereof into the Court" within six months then next ensuing, and that the same so entered and recorded should be "a sufficient assurance to eũy such ffree inhabitant, his & theire heires and assignes, of such estate of inheritance, or as they shall haue in any such howses, lands, or ffranketenem[t]s."[2] No little difficulty seems to have been experienced in

[1] Mass. Col. Rec., I., 306.

[2] Mass. Col. Rec., I., 116. It was probably in compliance with this order that the Boston Book of Possessions was compiled. Oct. 27th, 1636 (Mass. Col. Rec. I., 182), "Newe Towne p'sented a booke of their records vnder the hands of Will: Andrews, constable, John Beniamin, & Will: Spencer." June 4th, 1639 (*Ibid.*, I., 266), the court ordered that "All townes had respit to bring in the transcripts of their lands vntill the next Courte." Dec. 3d, 1639 (*Ibid.*, I., 284, 285), Concord, Lynn, Dorchester and Weymouth were fined five shillings each "for not giveing in a transcript of their lands." Nov. 11th, 1647 (*Ibid.*, II., 224), Springfield was ordered "within twelue months, to bring in a transcript of their land, according to y[e] law in that case p'vided." May 26th or 31st, 1652 (*Ibid.*, III., 275; IV. (part 1), 90), in the matter of the Sudbury Records the order of the court was as follows: "Whereas in times past, before the Courtes were keept in *in* Midlesex, the records of the lands of the seuerall townes within that county were kept in Boston, vppon the request of the deputy of Sudbury, in the behalfe of theire towne, it is ordred, that the secritary shall deliuer the booke of records of lands, sales, alienations &c. to the deputy of Sudbury, which concernes that towne, that so they may deliuer the same to the recorder of theire owne county."

putting the new system into operation, for the General Court, March 4th, 1634–35, "agreed, that the order made in Aprill 1634," should "forthwith be putt in execuc̃on,"[1] and on the first of August, 1637, ordered "That some course bee taken to cause men to record their lands, or to fine them that neglect."[2] There was much merit in this plan. It provided for double registration. Land records were to be kept in every town, while a transcript was to be placed in the office of the Secretary of the Colony. It was analogous to the system in use in England in the matter of Ecclesiastical Records, that of Parish Records and Bishops' Transcripts. Double registration of deeds in both town and county has advocates even to-day in this Commonwealth. Whether this last scheme, if we take into consideration its greater cost as well as the vast increase in the bulk of the records, is now practicable may be doubted, but it would be invaluable in case of the destruction by fire or otherwise of either set of records.[3]

At a General Court held in Boston 7th day 8mo, 1640, it was ordered that "no morgage,. bargaine, sale, or graunt hearafter to bee made of any houses, lands, rents, or other hereditaments, shalbee of force against any other person except the graunter & his heires, unlesse the same bee recorded, as is hearafter exp̃ssed;" and further, that such instruments should be recorded at Ipswich and at Salem for lands within the jurisdiction of those courts, "& all the rest to bee entered" by "the recorder at Boston."[4]

This created three registration districts for the whole Colony, but in 1641–42 it was ordered that the "Clerke of every Shire Court"[5] should record all such instruments. It was not until 1643 that the first division of the Colony into counties was made, and not until 1650 that the General Court ordered that "henceforth any graunt, sale, bargan, or morgage of howses, lands, rents, or other heriditaments, recorded by the recorder of y^{t} shire in which such howses, lands, rents, or heriditaments are, shalbe sufficient securitie vnto the purchaser, or grauntee, without any further cer-

[1] Mass. Col. Rec., I., 137. [2] *Ibid.*, I., 201.

[3] All the records in the Registry of Deeds, part of the Probate Records, and all the files of the Probate Court for the County of Barnstable, were destroyed by fire Oct. 22, 1827. All the Probate Records for the County of Cumberland, which, although now in Maine, was formerly a part of Massachusetts, were consumed in the great Portland fire of July 4, 1866. The records of several towns and parishes in this Commonwealth have also been totally destroyed in the same way.

[4] Mass. Col. Rec., I., 306, 307. [5] Mass. Col. Laws, Edition 1660, p. 21.

tifyinge vnto the recorder or secritary for the Generall Courte; and that clause in the close of the printed law, title Conueyances Fradulent, page 14, requireinge the same, is hereby repealed."[1]

These extracts from the Colony Records show the gradual development in this Commonwealth of the plan of recording conveyances of land, and the County system so established is in operation to this day. For the first two centuries the records increased but slowly, and it answered fairly well, but since then the growth has been enormous. For instance, in the County of Suffolk, nineteen books sufficed for all deeds and other instruments left for record prior to A. D. 1700. On the first of January, A. D. 1800, the number had risen to only 193. At the end of the year 1890 there were in the Registry of Deeds more than ten times that number of books, — *i. e.* 1,974, — huge folio MS. volumes containing, most of them, 640 pages each. These are the statistics for a single county. In the three counties of Suffolk, Norfolk, and Middlesex there are more than 4,500 volumes, while in all the counties together the aggregate is more than 10,000 volumes, and to this great number additions are continually being made. Nearly 24,000 deeds and other instruments were left for record in the County of Suffolk alone during the past year.

These figures are certainly appalling, and we may well pause to ask where will this end, and what will be the condition of affairs a generation hence, if this rate of increase holds. Yet everything tends to show that even this rate will be far surpassed in the near future. The extraordinary growth of the country in wealth and population has already rendered necessary some other method of land transfer. It is evident that the present system, cumbersome and unwieldy at best, is fairly breaking down of its own weight. In fact, the whole system is defective, and is open to many obvious objections. It necessitates long and exhaustive searches of a mass of records which are continually becoming more and more enormous, the tedious preparation of abstracts, disputes over titles, difficulties, delays, expense, examinations and re-examinations without end. Speaking of this system of registration of deeds, Lord Cairns pronounced "the objections to a register of deeds to be so manifest that hardly any person in the present day would venture to propose it. It would not simplify title in the least. It only puts on a formal record the whole of that multitude of deeds

[1] Mass. Col. Rec., III., 203; IV. (pt. 1), 22.

and conveyances, of the extent and complexity of which we have already so much reason to complain." Moreover, so far from affording security against fraud, it actually opens the door to new and distinct species of fraud.

But it has been reserved for another branch of our race, while engaged in carrying the light of English civilization into another continent, under conditions of life not unlike those with which we ourselves have had to contend, to solve the problem which has hitherto baffled us here, and it is to Australia that we must look for the first establishment among English-speaking people of an absolutely safe and practicable system of registration.

The difference between the two systems is fundamental. Here we have registration of deeds; in Australia, not registration of deeds, but registration of titles. There it is not on the execution and delivery of an instrument, but upon the entry in the Register, that the title passes. The Australian system avoids, as its originator, the late Sir Robert R. Torrens, truly says, "the accumulation of instruments with voluminous indexes, the fatal objection to other systems." Registration under the Real Property Act is not compulsory, but optional. No one is obliged to register his title, but having once made choice of the new method, he cannot afterward convey his property by deed. It is "under the Act," as it is called. The course of procedure is simple, and is as follows: —

In Australia the land-owner who wishes to avail himself of the benefit of the Act — and it may be repeated that it is entirely optional with him — makes application to the Registrar-General. His application, together with the deeds, other evidences and abstracts of title, with a plan of the land duly certified, are submitted to the official examiners of titles. They proceed to examine the title just as is done here for a purchaser under the old system, and make report to the Registrar-General. If the applicant is found to have a good title, the land is brought under the operation of the Act by the issue of a certificate of title vesting the estate indefeasibly in the applicant. If the title proves to be bad, the application is rejected.

If the applicant is found to be in possession of the land under a good holding title, that is, if he appears rightfully entitled to it, and the evidence is such as to lead to the conclusion that no other person is likely to succeed against him in an action for ejectment,

although the evidence he produces might not be sufficient to compel an unwilling purchaser to take the land, the examiners report the case to the Registrar and recommend that notices be served on all parties in interest, and also upon the owners and occupants of adjoining land, if necessary, and that advertisement be made more or less extensively, as the nature of the case may demand. If no objection be made by filing a caveat within the time prescribed by the Registrar, the land is brought under the provisions of the Act, the certificate granted to the applicant, and an indefeasible title is vested in him.

If a caveat be filed within that time, the Registrar suspends action until it be withdrawn, or until he receives a notice of the final judgment of the Supreme Court upon the question raised.

One great advantage in this method is that it affords a ready way of clearing titles of technical imperfections. Titles, as every experienced conveyancer is aware, are not to be divided into two classes only, the good and the bad. There is a large intermediate class, to which perhaps the great majority of them belong, where the title is good enough for all practical purposes, but where, generally through the stupidity of unskilful scriveners, slight defects, purely technical in their nature, and of no sort of consequence from any reasonable point of view, faint blemishes that a court of last resort would summarily dispose of, have become what are called "clouds on the title." These insignificant defects, when duly magnified by some quibbling examiner, are made to appear formidable enough to the timid investor; but their principal use is to enable the once eager purchaser, whose ardor has suddenly cooled, to refuse to comply with the contract made in good faith for the purchase of the land over which these mysterious "clouds," hitherto not visible to the naked eye, now so darkly and portentously hang. To real-estate owners, who have long suffered from this state of things, the Australian system will prove a priceless boon. If it did only this and nothing more it would be worth all the cost of its adoption here. It would bring into the market estates which are not now salable, and would clear the title once for all from all these "cobwebs of the law."

This certificate issued by the Registrar is not simply a certificate, but an absolute guaranty of title by the Government. A small fee, paid in each case by the land-owner on making his

application, goes to form an Assurance Fund, which is kept invested in Government bonds. This fund, as it is seldom drawn upon, has increased in all of the colonies to large proportions. That the transaction is a safe one for the Government is shown by the fact that for eighteen years not a single claim against it was sustained, either in New South Wales or in Tasmania. As the title is carefully examined, it is not probable that an outstanding interest would be overlooked any more than now under our present system. But if through any mischance such a claimant should afterwards appear, he would have his claim on the fund provided for just such a contingency. This compensation in money payment is more just and equitable than to reinstate him in possession of the land. But in actual practice, experience has shown that such a case is of the rarest occurrence, and this consideration need not delay us.

These certificates are in duplicate. They define the land by description, by reference to officially recognized plans, or where necessary by diagram on the certificate, and set forth the nature of the estate of the applicant, whether in fee simple or not, noting by endorsement all lesser estates, leases, mortgages, or other interests affecting the land at the time. One of these certificates of title is given to the applicant; the other is retained by the Registrar-General.

The official Register is formed by binding together the duplicates of all these certificates so retained by him. Each of these certificates represents a distinct title and constitutes a distinct folium of the Register. In case of sale of the land, the memorial of the transfer may be entered on the existing certificate, or that may be surrendered, and a fresh certificate may be taken out in the name of the purchaser. This will, in its turn, form a fresh root of title, and will occupy a separate folium of the Register.

A registered land-owner may at any time in exchange for his original certificate procure a fresh one from which all mention of mortgages which have been paid off and discharged, and of leases which have terminated, and all other encumbrances which have ceased to exist, are omitted. The Registrar also can require the owner, when his certificate is too much encumbered with such dead matter, to take out a new one free from all such defunct charges.

Land once brought under the Act cannot be conveyed by

deed, but printed forms of contract are provided at the Registry Office and at the stationers' shops. These instruments when executed are valid as agreements between the parties, and are the authority to the Registrar to enter the memorial on the Register; and the entry by him on the folium of the Register appropriate to that lot of land in question, of the memorials of all transfers and charges so created, constitutes Registration. The like entry is also made on the certificate in the hands of the owner, and registered estates are held free of all charges and incumbrances whatsoever, save such as appear on the Register, and endorsed on such certificate. This certificate is conclusive evidence of title.

This duplicate method of conveyancing by Registration of Title is admirably simple and inexpensive. Each separate estate is represented by only one instrument in the hands of the registered owner, and it discloses every incumbrance which it is necessary for any one dealing with him to know. The duplicate being filed in the Registry Office, searches are needless except for the purpose of ascertaining if any caveats have been filed since its date. This is a trifling matter and causes no delay. It is not uncommon for a mortgage to be placed on an estate in the space of an hour at a cost of only a few shillings. Moreover, this duplicate system precludes any possibility of loss in the event of a fire.

It is a great mistake to suppose that the extraordinary success which has attended the introduction of this system into the Australian Colonies is due to the fact that Australia is a new country, and that therefore Registration of Title is not equally suited to the needs of older communities. On the contrary, its originator always claimed that, so far from being an advantage, it was a distinct disadvantage that he was compelled to try it first in Australia. And the reason is obvious. In an old country the land is improved, monuments abound and are fixed and certain, possession undisputed, and titles easily proved. Moreover, in Australia, at the time of the passage of the Act, so far from its being true that the land had recently come directly from the Crown, a large part of it had been in private ownership for sixty years or more, and during that time had been subjected to all the vicissitudes of unskilful conveyancing and presented all the difficulties which usually result from such a condition of affairs. And further, so far from its being an advantage that there was a survey of the Crown Lands

already made, that survey itself was an additional source of error, as it was so inaccurate as to be worse than useless.

The success of Title Registration in Prussia has been just as marked as in Australia, and Prussia certainly cannot be called a new country.

The system has safely passed the experimental stage. It was introduced into South Australia thirty-three years ago; into New South Wales twenty-nine years ago; and it is now in successful operation in eight or nine British Colonies, including British Columbia. A whole generation of men have grown up under it, and it has given universal satisfaction. It is impossible in the brief space allotted to this article to go much into the details of this method, but the practised eye of the conveyancer can see how thoroughly feasible and admirably simple this duplicate method of conveyancing is, and how cleverly it avoids the rocks and shoals and sunken reefs on which our present system has been wrecked.

The Australian System does not necessarily change existing laws. It is simply the providing of better machinery for carrying out those laws. It substitutes a better system of conveyancing, and, by granting indefeasibility of title, gives the land-owner absolute security. In fact, as its originator says, "There is no legitimate object which a land-owner can accomplish under the existing law, which may not be accomplished more readily, more safely, and at infinitely less expense under [the Australian] system," and "by registration of titles security has been established for insecurity, simplicity for complexity, and the cost has been reduced from pounds to shillings."

Moreover, who can tell what influence an expeditious and inexpensive method of transferring land, of converting real into personal property at will, and *vice versa*, may not have had in enabling our kindred to build up in the Southern Hemisphere their rich and prosperous Colonial Empire? The extraordinary development of wealth and population there may in part be attributed to the land-transfer system they were wise enough to adopt.

The whole tendency of modern times is to make the transfer of land as easy and simple as that of personal property. In a commercial age, Feudal ideas as to land are entirely out of place. Cumbersome and antiquated methods of transfer must give way to the needs of the present time. Under the new system, land can be transferred as easily as stock in a corporation. It can be con-

verted into cash, or loans can be obtained on it, without loss of time, and without putting in motion the whole ponderous machinery with which the old system is overweighted. Suppose there should be a sudden panic in the money market, the land-owner by this system could effect a loan on his real estate in an hour while by the present system weeks might pass in tedious examination of title. By that time either the crisis would be over or the owner in insolvency. Ability to turn at once real property into personal is a great power. It adds enormously to the value of land. There is no good reason why real property should not pass from hand to hand just as readily as personal property. And when the American land-owner awakens to a realizing sense of the disadvantages under which he now suffers, as compared with his Australian brother, he will not rest until a thorough and complete measure of Land Transfer Reform is fully established in this country as well as in Australia.

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